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IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL A. KNOWLES, Warden, California Department of Corrections and Rehabilitation, *Petitioner*,

v.

ALEXANDRE MIRZAYANCE, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

BILL LOCKYER
Attorney General of California
MARY JO GRAVES
Chief Assistant Attorney General
MANUEL M. MEDEIROS
State Solicitor General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
STEVEN E. MERCER
Deputy Attorney General
*DONALD E. DE NICOLA
Deputy Solicitor General
**Counsel of Record*
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2388
Fax: (213) 897-2806
Counsel for Petitioner

PETITIONER'S REPLY MEMORANDUM

1. Mirzayance devotes only the last few pages of his opposition brief to the Questions Presented. On the question of the Ninth Circuit's failure to properly apply 28 U.S.C. § 2254(d), Mirzayance simply asserts that the panel made a "textbook" prefatory statement of the § 2254(d) standard. Opp. 23. But he fails to come to grips with the facts revealing that the panel did not adhere to the standard. First, rather than review whether the state court decisions had been reasonable, the panel stated that it would analyze Mirzayance's claim in light of "the evidentiary hearing held by the district court upon remand." Second, in actually carrying out that analysis, the panel merely decided the question of error, concluding that counsel's performance was inadequate and that Mirzayance suffered prejudice under *Strickland* v. *Washington*. Its analysis never even adverted to the separate question that serves as the dispositive one under AEDPA: whether, wrong or not, the state court decision was nevertheless reasonable. See *Lockyer* v. *Andrade*, 538 U.S. 63, 71, 75 (2003).

As explained in the State's petition, it would not have been "objectively unreasonable" under "clearly established Federal law" for the state courts to decline to apply a per se "sole defense/nothing to lose" corollary to the *Strickland* competent-performance rule that Mirzayance—his denials notwithstanding—presses here. Cf. *United States* v. *Cronic*, 466 U.S. 648, 656-57 n.19 (1984) ("If there is no *bona fide* defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade."). And it is not "objectively unreasonable" to conclude that, in any event, withdrawal of the not-guilty-by-reason-of-insanity plea gave rise to no sufficient "probability" of prejudice under the second prong of the *Strickland* standard. Reasonable support for such a conclusion lies in the fact that Mirzayance bore the burden of proof on the insanity issue and that the same jury already had found that Mirzayance had killed with premeditation and deliberation. Perhaps most important, strong evidence of Mirzayance's consciousness of guilt at the time of

the murder hopelessly undercut any probability that the jury would nevertheless find that he was "insane" in that he could not tell the difference between right and wrong. See Pet. for Cert. 13-14.

2. Even if Section 2254(d) as amended by AEDPA did not compel denial of habeas corpus relief on the basis of the objective reasonableness of the state-court decisions alone, Mirzayance is incorrect in proffering his one-sided version of the "facts" for those properly found by the district court and improperly ignored by the Ninth Circuit panel. As explained in the certiorari petition, the district court after an evidentiary hearing resolved the essential factual disputes against Mirzayance. Pet. for Cert. 4, 15. Among other findings, the district court concluded: that trial counsel's "decision was carefully considered, not rashly made," after concurrence by co-counsel; and that Mirzayance's "parents may not have *expressly refused* to testify, but they expressed a pronounced reluctance to do so, which amounted to the same thing." See Pet. App. 43-47. As explained in the certiorari petition, Pet. for Cert. 14-16, the district court's factual- findings would have compelled the denial of relief, but the Ninth Circuit improperly ignored them in derogation of the "clear error" standard of review.

Mirzayance's "Statement of Facts" is little more than an argument about the credibility of witnesses and the persuasiveness and weight of the evidence. Thus, Mirzayance asserts that his lawyer did not know the legal difference between the mental state for first-degree murder and the mental state for insanity. See Opp. 6-7. But he makes that assertion without the benefit of any finding by either the district court or the Ninth Circuit—and without justification in the record. In addition, Mirzayance argues that the district court's conclusion—that the parents' pronounced reluctance to testify in context conveyed an outright "refusal" to testify and that counsel believed it to be a "'done deal' that any beseeching on his part could not undo," see Pet. App. 43-47—somehow is not a finding of fact.

However incorrect he is in asserting that this was not a factual finding, it is nevertheless noteworthy that Mirzayance does not dispute that the record provided the district court with reasonable support for its conclusion. If a finding of fact at all—and it clearly is—it was binding on the appellate panel.

3. Perhaps seeking to avoid application of AEDPA's deferential-review standard, Mirzayance also asserts that the state courts failed to adjudicate the merits of his ineffective-counsel claim. Opp. 1. But he is wrong: both the California Court of Appeal and the California Supreme Court summarily resolved Mirzayance's ineffective-assistance claim, Pet. App. F & H; and, under California procedure, such rejections are adjudications on the merits. *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995); *In re Clark*, 855 P.2d 729, 741 n.9 (Cal. 1993); *In re Lawler*, 588 P.2d 1257, 1259 (Cal. 1979); see *Harris* v. *Superior Court,* 500 F.2d 1124, 1126 (9th Cir. 1974). Mirzayance himself acknowledges, elsewhere in his opposition brief, that the panel was correct to apply AEDPA's standard of review. Opp. 22. Indeed, in the district court and in the first Ninth Circuit appeal, Mirzayance repeatedly acknowledged that the AEDPA standard governed his claim. He cannot change his position now. See *Zedner* v. *United States*, 126 S. Ct. 1976, 1987 (2006).

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: October 30, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of California

MARY JO GRAVES
Chief Assistant Attorney General

MANUEL MEDEIROS
State Solicitor General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

STEVEN E. MERCER
Deputy Attorney General

DONALD E. DE NICOLA
Deputy Solicitor General
Counsel of Record

Counsel for Petitioner